Filed 12/2/04 P. v. Navarro CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. LISANDRO NAVARRO, Defendant and Appellant.	B171871 (Los Angeles County Super. Ct. No. BA249361)

APPEAL from a judgment of the Superior Court of Los Angeles County. George Gonzalez-Lomeli, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General of the State of California, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, and Jonathan J. Kline, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Lisandro Navarro was convicted, following a jury trial, of one count of forcible rape in violation of Penal Code section 261, subdivision (a)(2) , one count of sexual penetration with a foreign object in violation of section 289, subdivision (a)(1), one count of forcible oral copulation in violation of section 288a, subdivision (c)(2), one count of attempted forcible rape in violation of sections 664 and 261, subdivision (a)(2), one count of corporal injury to a cohabitant in violation of section 273, subdivision (a), one count of assault by means likely to produce great bodily injury in violation of section 245, subdivision (a)(1), one count of criminal threats in violation of section 422 and one count of battery in violation of section 243, subdivision (e)(1). The jury found true the allegations that appellant personally inflicted great bodily injury in the commission of the forcible rape, sexual penetration and forcible oral copulation offenses within the meaning of section 667.61, subdivision, subdivisions (a) and (d). The jury also found true the allegations that appellant inflicted great bodily injury under circumstances involving domestic violence in the commission of the corporal injury, assault and criminal threats offenses within the meaning of section 12022.7, subdivision (e).

The trial court sentenced appellant to 15 years to life for the forcible rape conviction pursuant to section 667.61, plus a total of 10 years for the corporal injury conviction, accompanying great bodily injury enhancement and the attempted forcible rape conviction.[1] The trial court sentenced the remaining counts concurrently.

Appellant appeals from the judgment of conviction, contending that the trial court erred in failing to instruct the jury on the corpus delecti rule and the availability of intoxication as a defense to attempted rape, and also erred in instructing the jury on the intent required for conviction of attempted rape and the timing requirement of the great bodily injury enhancement. Appellant further contends that the trial court abused its discretion in dismissing a seated juror. In a supplemental brief, appellant contends that

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[1] This term consists of the high term of four years for the corporal injury conviction, the high term of five years for the great bodily injury enhancement, and one year for the attempted rape conviction.

the recent United States Supreme Court decision in *Blakely* v. *Washington* (2004) 542 U.S. ___ renders the trial court's imposition of consecutive sentences and of the upper term for the assault conviction and accompanying great bodily injury enhancement unconstitutional.

Facts

Reyna C. lived with appellant for about six weeks, beginning in December 2002. She moved out when he began drinking excessively. Reyna moved into a small trailer with her two children, 13-year-old Erick and 5-year-old Carla.

On February 15, 2003, Reyna was outside the trailer speaking with a neighbor, Miguel Herrera. Erick saw appellant hiding near the trailer. Reyna went inside to go to the bathroom. Appellant followed her, and beat her and called her names. He stopped when Erick intervened. Reyna then chased appellant out of the trailer with a broom.

On February 16, at some point after 11:00 p.m., appellant broke into the trailer. He beat Reyna and threatened to disfigure her. Appellant told her that he wanted to make love to her. She told him no. Appellant nevertheless removed her clothes, and performed various sexual acts. Reyna asked him to stop and he hit her. They both fell asleep.

Reyna was awakened by appellant hitting and choking her. He told her that he wanted to make love to her. She said that she did not want to have intercourse.. Appellant nevertheless forced her to have intercourse with him.

The next morning, February 17, Reyna asked appellant to take Carla to school. He did so. At that time, he took money from Reyna's pants' pocket against her wishes. When appellant returned, he resumed hitting Reyna. He again told her that he would disfigure her face. He put a pair of scissors to her throat. Appellant said that he was going to disfigure other parts of her body as he had Gladys. Appellant explained that he had disfigured Gladys because men were always looking at her. He also told her that at the end of the day she would not suffer much and that he would take her where he took Gladys. Appellant said that she would be the fourth woman he killed.

To prevent appellant from hurting her, Reyna told appellant that she would come back to him, and asked his forgiveness for her rejection of him. She kissed and hugged him. Appellant calmed down and went into the bathroom. When appellant came out of the bathroom, Reyna pushed him and ran out of the trailer to a neighbor's house. Reyna's neighbor called the police.

Officers Hector Esparza and Gerald Harden responded to the call. Reyna had difficulty speaking because her mouth was swollen. She told Officer Esparza that appellant had beaten her. Officer Esparza called an ambulance for Reyna. Officer Harden discovered two bloody pillows and bloody bedding inside the trailer.

Officers Joseph Oseguera and Gorgina Villalobos responded to a call from the U.S.C. Medical Center in the early morning of February 18. Reyna told Officer Oseguera that appellant had taken $40 from her. She told Officer Villalobos that she had been beaten and raped by her boyfriend. Reyna said that she had not mentioned it earlier because she was in shock.

Reyna was examined by sexual assault nurse examiner Deborah Suyehara. Suyehara observed bruises on Reyna's left wrist, left elbow, right forearm and face. She also observed injuries to Reyna's right jaw, most of her left face and her upper and lower left lips. Reyna had difficulty speaking due to these injuries. Suyehara conducted a genital exam of Reyna and observed two red circular bruises on her hymen. These bruises were consistent with non-consensual sex.

Los Angeles Police Detective Sunny Romero interviewed appellant on February 18. Appellant stated the he went to Reyna's trailer on February 15 and found that she was drunk. Reyna's son Erick told appellant that Herrera had slapped Reyna.

Appellant went to Reyna's trailer at 8:00 a.m. on the 17th, but Reyna was not there. Appellant gathered friends to confront Reyna about her drinking, and they all waited at the trailer for an hour for Reyna to return, then left. Appellant did not remember any of the friends' names.

Appellant searched for Reyna, did not find her, and returned to the trailer. Reyna arrived at the trailer at the same time appellant did. They argued and Reyna attacked

appellant with a knife. He defended himself by slapping her a couple of times, then removing the knife from her hand. Reyna calmed down. Appellant and Reyna had consensual sex.

When Detective Romero showed appellant pictures of Reyna's injuries, he began to cry. He continued to claim that he only slapped her, but acknowledged that he hit very hard. He then said that he lost control because he was drinking and jealous and could not remember how many times he hit her. He continued to claim that the sex was consensual. He denied threatening her. He only told her a story about Gladys to encourage her to pay attention to her children.

At trial, appellant offered evidence that Erick told Los Angeles Police Detective Richard Johnson that when he went to bed at 10:00 p.m. on February 15, his mother was outside with Herrera. The next morning, she had a swollen lip. She told Erick that she had hit a door, but Erick believed that Herrera had hit her. Erick had seen appellant slap Reyna at some earlier point.

Appellant also offered evidence that Reyna told Detective Romero that she had been drinking with Herrera for two to three hours when appellant arrived at the trailer on the 15th and that she resumed drinking with Herrera after appellant slapped her. Reyna told Detective Romero that Herrera wanted to have sex with her but she said no and pushed him away. Herrera then slapped her.

Appellant also offered evidence of Herrera's interview with Detective Romero. Herrera told Reyna that if she preferred appellant to him, she was crazy. Reyna then slapped Herrera and said, "You are not going to call me crazy." Herrera slapped her back, but not hard.

Discussion

1. Corpus delecti rule

Appellant contends that the trial court erred in failing to instruct the jury sua sponte with CALJIC No. 2.72 which tells the jury that there must be proof of the crime

independent of the defendant's extrajudicial admissions.[2] We agree, but find that the error was harmless.

Whenever an accused's extrajudicial statements form part of the prosecution's evidence, the trial court must instruct the jury sua sponte that a finding of guilt cannot be predicated on the statements alone. (*People* v. *Alvarez* (2002) 27 Cal.4th 1161, 1170.)

A crime's corpus delicti consists of (1) a loss, injury or harm, and (2) a criminal agency as its cause. (*People* v. *Jennings* (1991) 53 Cal.3d 334, 364.) The corpus delicti instruction is required "to ensure 'that the accused is not admitting to a crime that never occurred.'" (*People* v. *Carpenter* (1997) 15 Cal.4th 312, 394.) Thus, proof of the corpus delicti does not require proof of the identity of the perpetrators, that is, it is not necessary that it connect the defendant with the commission of the crime. (*People* v. *Cullen* (1951) 37 Cal.2d 614, 624.) Proof of the corpus delicti requires only proof that a crime has occurred. The prosecution may establish the corpus delicti by circumstantial evidence, and need only establish the corpus delicti by a slight or prima facie showing. (*People* v. *Jennings*, *supra*, 53 Cal.3d 334, 364.)

Failure to give a corpus delecti instruction is considered harmless if there appears no reasonable probability the jury would have reached a result more favorable to the defendant if the instruction had been given. (*People* v. *Alvarez*, *supra*, 27 Cal.4th at p. 1181.) "If as a matter of law [a] 'slight or prima facie showing' [of the corpus delecti] was made, a rational jury, properly instructed, could not have found otherwise, and the omission of an independent proof is necessarily harmless." (*Ibid*.)

We find that as a matter of law, the prosecution made a prima facie showing of the corpus delecti of the crimes. The bruises on Reyna's body, observed by police and

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[2] CALJIC No. 2.72 provides: "No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of [any confession] [or] [admission] made by him outside of this trial. [¶] The identity of the person who is alleged to have committed a crime is not an element of the crime [nor is the degree of the crime]. Such identity [or degree of the crime] may be established by [a] [an] [confession] [or] [admission]."

hospital personnel, are more than adequate to make a prima facie showing that she was injured by a criminal agency and that the crimes of assault and battery occurred. The nurse who examined Reyna testified that Reyna had vaginal injuries consistent with non-consensual intercourse, and this is an adequate prima facie showing that the sex crimes occurred. Reyna's statements are additional evidence that the crimes occurred. (See *People* v. *Belcher* (1961) 189 Cal.App.2d 404, 408 [victim's uncorroborated statements established corpus delecti].)

We cannot agree with appellant that the jury did not find Reyna credible and would not have convicted him of the sex crimes if they had been instructed on the corpus delecti rule. The purpose of the corpus delecti rule is not to resolve a credibility contest between a defendant and the alleged victim by forcing the victim to come up with proof in addition to her own testimony that the defendant was her attacker. The rule is intended to prevent a defendant from being convicted *solely* on his own testimony. Appellant did not admit that he forced Reyna to engage in sexual acts. Thus, the jury could not have convicted appellant of the sex crimes on the basis of his statements alone. If the jury had not found Reyna credible, it would not have convicted appellant of the sex crimes at all.

2. Removal of juror

Appellant contends that the trial court abused its discretion in dismissing a juror before deliberations began. We do not agree.

On October 22, the trial court read the bulk of the instructions to the jury. The first reported statement by the court on October 23 was an announcement that Juror No. 11 was not present and was experiencing car problems. The court stated: "He lives in Manhattan Beach and cannot be here. So rather than hold the proceedings up, we are going to replace Juror No. 11 with Alternate No. 1. If you would take that seat, if you would. . . . You have officially been replaced - - officially replacing Juror No. 11. "

We see no abuse of discretion on the record before us. There was ample reason to discharge the juror. A juror who is not present in the courtroom clearly cannot perform his duties. Rather than delay the trial, the court exercised its discretion to replace the

juror so that the trial could be continued expeditiously. The court had no obligation to burden the parties, court and jurors with a delay of the trial. Further, the court had no obligation to send a deputy sheriff or a marshal to bring the juror to court, for the trial court's exercise of its discretion to dismiss a juror "'is not rendered abusive merely because other alternative courses of action may have been available to the trial judge.'" (*People* v. *Bell* (1998) 61 Cal.App.4th 282, 288.)

3. Attempted rape instructions

Appellant contends, and respondent agrees, that the trial court erred in instructing the jury that attempted rape is a general intent crime. Appellant also contends, and respondent concedes, that the trial court erred in failing to instruct the jury that appellant's voluntary intoxication defense applied to the attempted rape count. We agree as well, but find the errors harmless.

Attempted rape is a specific intent crime. (*People* v. *Atkins* (2001) 25 Cal.4th 76, 88.) Here, the attempted rape was charged in Count 5 of the information. The trial court instructed the jury that Counts 2, 4, 5, 7, 9, and 12 required general criminal intent and that Counts 1, 3, 8, 10, and 11 required a certain specific intent. Thus, the trial court erroneously instructed the jury that attempted rape was a general intent crime.

The trial court also instructed the jury with CALJIC No. 6.00 that "[a]n attempt to commit a crime consists of two elements, namely a specific intent to commit the crime and a direct but ineffectual act done toward its commission." The Count 5 attempted rape was the only attempted crime charged. The prosecutor told the jury in closing arguments that attempted rape consisted of a specific intent to commit the crime and a direct but ineffectual attempt act toward the commission of the crime. Further, the nature of appellant's acts precluded a belief that they were done without specific intent. Reyna testified that appellant told her that he wanted to "make love" to her. She told him that the did not want to, but he nevertheless removed her clothes and attempted to penetrate her. Under these circumstances, we see no reasonable probability (or possibility) that appellant would have received a more favorable verdict if the jury had been instructed

that attempted rape was specific intent crime. (See *People* v. *Viscotti* (1992) 2 Cal.4th 1, 58-59 [prosecutor's argument]; *People* v. *Hill* (1967) 67 Cal.2d 105, 117 [nature of acts].)

We cannot agree with appellant that the jury's acquittal on the burglary charge shows that the jury, if properly instructed, would have acquitted him on the attempted rape charge. The burglary instruction told the jury that in order to convict appellant, the jury must find that he entered Reyna's trailer with the specific intent to commit rape. Given the extensive beating which appellant inflicted on Reyna upon first entering the trailer, we find it entirely likely that the jury believed that appellant entered the trailer intending to assault Reyna, and that he formed his intent to rape after entering the trailer.

We likewise find harmless the trial court's error in instructing the jury that voluntary intoxication was not a defense to the Count 5 attempted rape charge. The jury was correctly instructed that voluntary intoxication was a defense to the count 3 charge that appellant penetrated Reyna with a foreign object, and still convicted appellant of that charge. This forcible penetration occurred at virtually the same time as the attempted rape, and so appellant's level of intoxication would have been the same for both crimes. Thus, we see no reasonable probability or possibility that appellant would have been acquitted on the attempted rape charge if the jury had been instructed that voluntary intoxication was a defense to that charge.

4. One Strike Instruction

Appellant contends that the trial court erred in instructing the jury that great bodily injury need only occur "at the time of the commission" of the charged sex crimes. He contends that the trial court should have used the statutory language of "in the commission" of the charged sex crimes. The special verdict form uses the "in the commission" language. We see no reasonable probability that the jury misapplied the court's instruction.

The phrase "at the time of the commission of the crime" indicates an action which occurred simultaneously with the commission of the crime. The phrase "in the commission of the crime" conveys a similar meaning. If there is any difference, it is that

the phrase "at the time of " conveys a narrower time span than "in," and thus benefited appellant. (See *People* v. *Mason* (1960) 54 Cal.2d 164, 168-169 [killing which took place 20 hours after burglarious entry occurred "in the commission of" the burglary].)

Appellant discusses extensively the required relationship between a killing and the underlying felony in order for that killing to be "in the commission of" the underlying felony. These cases say nothing about how a jury might understand the phrase "at the time of the commission of."

To the extent that appellant contends that the trial court should have instructed the jury in more detail on the relationship required for a crime to be deemed to have occurred "in the commission of " another crime, we cannot agree.

As our Supreme Court has explained: "[I]t is doubtful whether the . . . phrase ['in the commission of'] is one that jurors would be unable to comprehend without amplification." (*People* v. *Guzman* (1988) 45 Cal.3d 915, 952, overruled on other grounds in *Price* v. *Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

In felony murders, it is only when the evidence raises a genuine issue of whether the murder was committed in the commission of the felony that a trial court has a sua sponte duty to clarify the term "in the commission of." (*People* v. *Cavitt* (2004) 33 Cal.4th 187, 204.) Cases that raise a genuine issue of whether the murder was committed in the commission of the felony "'are few indeed.' It is difficult to imagine how such an issue could ever arise when the target of the felony was intentionally murdered by one of the perpetrators of the felony." (*People* v. *Cavitt*, *supra*, 33 Cal.4th at p. 204 fn. 5.) The situation here is parallel to the one described by the Supreme Court: the target of the rape was subjected to great bodily injury by the perpetrator of the rape. We see no need for a clarifying instruction.

To the extent that appellant contends his consecutive sentences for infliction of corporal injury and attempted rape would violate section 654 if the great bodily injury was in fact inflicted during the commission of a sex offense, we do not agree. As our Supreme Court has explained: "Penal Code section 654 offers little guidance regarding the meaning of 'in the commission of' under Penal Code sections 12022.3,

subdivision (a), and 667.61, subdivision (e)(4): it does not use the phrase." (*People* v. *Jones* (2001) 25 Cal.4th 98, 110.) Generally, sex crimes are defined narrowly for purposes of section 654 to permit commensurate punishment for the more culpable defendant who has committed multiple sex crimes against a victim, while the phrase "in the commission of" is given a broad construction to provide additional punishment when an additional act renders the sex crime more dangerous or heinous. (*Id*. at pp. 110-111.)

5. Sentencing

Appellant contends that the trial court's imposition of the upper terms for the count 6 assault conviction and accompanying great bodily injury enhancement and of consecutive sentences deprived him of his federal constitutional rights to a jury trial and to due process of law. We agree with respondent that appellant forfeited his claim by failing to object. Assuming for the sake of argument that the claim were not forfeited, we would find no error on the consecutive sentences and harmless error on the imposition of the upper term.

Well before appellant's sentencing hearing, the United States Supreme Court held that when proof of a particular fact exposes the defendant to greater punishment than that available in the absence of such proof, that fact is an element of the crime which the Fifth and Sixth Amendments require to be proven to a jury beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Ibid*.)

Following *Apprendi*, the United States Supreme Court decided *Blakely* v. *Washington* (2004) 524 U.S. ____ [124 S.Ct 2531]. In *Blakely*, the Court explained "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that

the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation] and the judge exceeds his proper authority." (*Id*. at p. ___ [124 S.Ct. at p. 2537].)

Unlike the defendant in *Blakely* v. *Washington* (2004) 524 U.S. ____ [124 S.Ct 2531], appellant did not object that the upper term or consecutive sentences constituted *Apprendi* error. (*Id*. at p. 2535.) Thus, appellant has forfeited his *Apprendi* claim, and related *Blakely* claim. (See *United States* v. *Cotton* (2002) 535 U.S. 625 [finding that defendant forfeited his *Apprendi* claim by failing to object during trial even though *Apprendi* was not decided until defendant's case was on appeal].)

Under California's determinate sentencing law, the maximum sentence a trial court may impose without any additional findings is the middle term. (Pen.Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a).) The court may impose the upper term only if it makes additional findings of circumstances in aggravation. (*Ibid*.) Under *Blakely*, unless those circumstances are based on facts reflected in the jury verdict, imposition of the upper term violates the defendant's Sixth Amendment right to a jury trial, and the sentence is invalid. (*Blakely* v. *Washington*, *supra*, 524 U.S. at p. ___ [124 S.Ct at p. 2538].)

Here, the trial court gave the following explanation of its decision to impose the upper terms: "This court opts to impose the high term in view of the certain factors and aggravation, including California Rules of Court 4.421(a)(1) and 4.421(a)(11)." The subdivision (a)(1) factor is "The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness." The subdivision (a)(11) factor is "The defendant took advantage of a position of trust or confidence to commit the offense."

There is an additional aggravating factor not specified by the trial court: appellant was convicted of other crimes for which consecutive sentences could have been imposed but which concurrent sentences are being imposed. (Rule 4.421(a)(7).) Appellant was convicted of making criminal threats, and was sentenced concurrently for that offense and the accompanying enhancement. As we discuss below, the decision to impose

concurrent or consecutive sentences is the trial court's to make. Thus, a trial court may properly find this factor under *Blakely*. One aggravating factor is sufficient to support the upper term. (*People* v. *Cruz* (1995) 38 Cal.App.4th 427, 433.)

Great bodily harm is reflected in the jury's true finding on the great bodily injury enhancement. Since that enhancement was imposed, great bodily injury cannot also be used as an aggravating factor for sentencing on the underlying conviction. (Cal. Rules of Court, rule 4.420; *People* v. *Coleman* (1989) 48 Cal.3d 112, 163-164.) Nevertheless, in light of this finding, we see no possibility whatsoever that, given the opportunity, the jury would have failed to find that appellant used great violence and displayed a high degree of cruelty, viciousness or callousness.

Since there is one valid aggravating factor and one factor which the jury would find true if presented with the opportunity, we see no possibility that appellant would receive a more favorable sentence if this matter were remanded for a new sentencing hearing. (See *People* v. *Price* (1991) 1 Cal.4th 324, 492 [when a trial court has given both proper and improper reasons for a sentencing choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chose a lesser sentence had it known that some of its reasons were improper].)

We see no federal constitutional violation in the imposition of consecutive sentences. The consecutive sentencing decision can only be made once the accused has been found beyond a reasonable doubt to have committed two or more offenses - - this fully complies with the Sixth Amendment jury trial and Fourteenth Amendment due process clause rights. Moreover, as our colleagues in the Third District have observed: "In this state, every person who commits multiple crimes knows that he or she is risking consecutive sentencing. While such a person has the right to the exercise of the trial court's discretion, the person does not have a legal right to concurrent sentencing, and as the Supreme Court said in *Blakely*, 'that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.' [Citation.]" (*People* v. *Sample* (2004) ___ Cal.App.4th ___, ___ [18 Cal.Rptr.3d 611, 625-626].)

Disposition

The judgment of conviction is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P.J.

GRIGNON, J.